

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

APPLICATION TO CHANGE WATER) RIGHT NO. 76E 30150235 BY ROCKING J) RANCH LLC)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On January 22, 2021, Rocking J Ranch LLC (Applicant) submitted Application to Change Water Right No. 76E 30150235 to change Beneficial Water Use Permit No. 76E 112880-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated July 14, 2021. The Applicant responded with information dated July 30, 2021 and received on August 2, 2021. The Application was determined to be correct and complete as of May 4, 2022. An Environmental Assessment for this Application was completed on August 30, 2022.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change an Existing Non-Irrigation Water Right, Form 606-NIR
- Attachments
 - Pump curve
 - Well logs
- Maps:
 - Maps showing Historical use, Proposed well, Existing and proposed water system, and zone of influence from proposed well.
- Historical Water Use Addendum (Form 606-HUA)

Information Received after Application Filed:

- Deficiency Letter Response, dated July 30, 2021

Information within the Department's Possession/Knowledge

- DNRC Deficiency letter, dated July 14, 2021
- Original file for perfected Provisional Permit No. 76E 112880-00

The following information is routinely considered by the Department. It is not included in the administrative file for this application, but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents:

- Technical Memorandum: DNRC Consumptive Use Methodology – Turf Grass, dated March 23, 2010

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes to change the point of diversion on verified Provisional Permit 76E 112880-00. Permit 76E 112880-00 was issued for 155 gallons per minute (GPM) up to 19.69 acre-feet (AF) of groundwater for irrigation (6.8 AF), multiple domestic (5 AF) and recreation (7.89 AF). Multiple domestic usage is year-round for five cabins; recreation usage is year-round for three recreation ponds that were permitted with a total capacity of 2.31 AF; and the irrigation period of use is permitted from April 15 to October 15 for irrigation of 3 acres of lawn. The priority date of Permit 76E 112880-00 is December 1, 2000. See Table 1 below for verified permit details.

TABLE 1: Water right proposed for change:

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
76E 112880-00	Irrigation (3 acres)	155 GPM	Irrigation 6.8 AF	April 15 to October 15	SENWSE Sec 19, T6N, R15W Granite County	Irrigation: W2SWNE and NWSE of Sec 19, T6N, R15W Granite County	December 1, 2000
	Multiple Domestic		Multiple Domestic 5 AF	January 1 to December 31		Multiple Domestic: SWNE and NWSE of Sec 19, T6N, R15W Granite County	
	Recreation (3 ponds)		Recreation 7.89 AF	January 1 to December 31		Recreation: SENWSE and NESWSE of Sec 19, T6N, R15W Granite County	
			Total: 19.69 AF				

2. The project completion deadline for Permit 76E 112880-00 was 12/31/2004. The Project Completion Notice was submitted on 12/30/2004 and the Missoula Regional Office verified the permit 01/01/2005.

3. Permit 76E 112880-00 is not supplemental with any other water rights. The place of use on Permit 76E 112880-00 overlaps a portion of the place of use of Permit 76E 30043968, but the water systems are separate and Permit 76E 30043968 serves different commercial buildings on the property.

4. There are no previous change authorizations on Permit 76E 112880-00.

Rocking J Ranch LLC - Change Application 76E 30150235

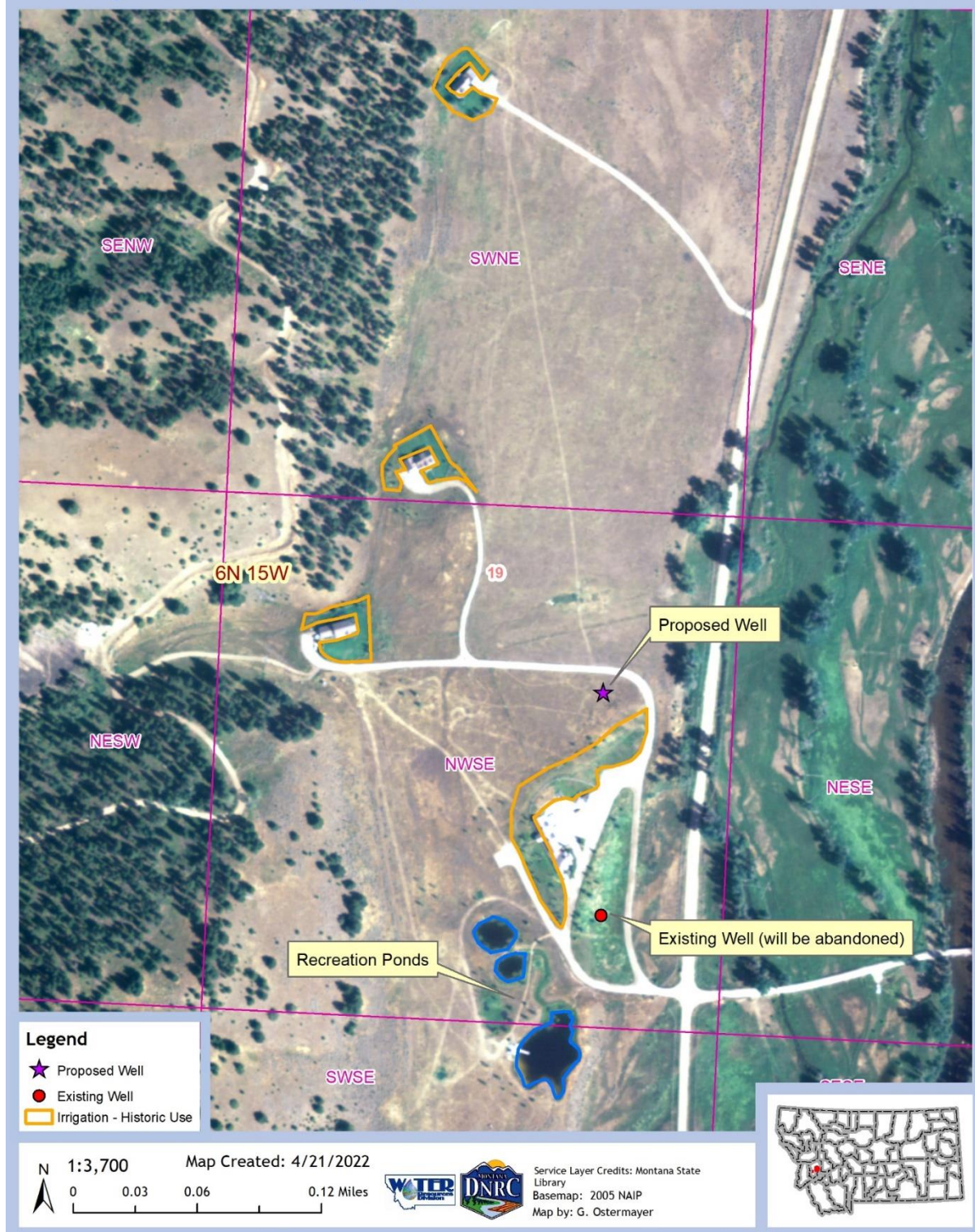


FIGURE 1: Map of the proposed and existing well, and places of use.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to change the point of diversion on verified Permit 76E 112880-00 to an existing well located in the NENWSE of Section 19, T6N, R15W, Granite County (PWS Well). The original point of diversion, consisting of a well located in the SENWSE of Section 19, T6N, R15W, Granite County (Westside Well) will be abandoned upon issuance of this change authorization. The proposed well (PWS Well) located in the NENWSE of Section 19, T6N, R15W, Granite County was previously authorized and verified for 110 GPM and 4.5 AF annual diverted volume under Permit 76E 30043968 and is proposed to be the new point of diversion on Permit 76E 112880-00. This proposed change will increase the total annual diverted volume from the PWS Well to 24.19 AF (4.5 AF with Permit 76E 30043968 + 19.69 AF with Permit 76E 112880-00), because total usage will now involve two permits, but will not increase the total maximum flow rate, which will remain 110 GPM.

6. The Applicant will be held to the following water measurement condition:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR

REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for

mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

9. The project completion deadline for Permit 76E 112880-00 was 12/31/2004. The Project Completion Notice was submitted on 12/30/2004 and the Department verified the permit on 01/01/2005. The historic use for Provisional Permits is defined by the Department as the maximum amount of water put to beneficial use by the date that the project completion notice was filed with the Department, equal to a total maximum volume of 19.69 AF.

Historic Flow Rate

10. Permit 76E 112880-00 was authorized to operate with a flow rate of 155 GPM from the Westside Well (GWIC ID 179080). There are two pumps installed in this well, and information submitted with the project completion notice on 12/30/2004 confirms the total capacity of two groundwater pumps used together to produce 155 GPM from the Westside Well.

Historic Place of Use

11. Permit 76E 112880-00 was authorized to provide water to 5 households, 3 recreation ponds, and 3 acres of lawn irrigation. Department review of 2005 NAIP aerial imagery confirms a maximum of 3 acres of irrigation within the irrigation place of use, 5 domestic structures (3 cabins, 1 bunkhouse, and a kitchen building), and 3 ponds with a total surface area of 1.01 acres.

Historic Consumptive and Diverted Volume

12. The Department calculates domestic use with on-site septic (individual drainfields) to be 10% consumptive. The Department standard applied to domestic usage is 1 AF per household,

which equates to 5 AF for 5 domestic structures. Consumption for the multiple domestic use of 5 AF with on-site septic is equal to 0.5 AF.

13. Permit 76E 112880-00 is used to fill 3 recreation ponds with a total surface area of 1.01 acres. The Department calculates pond consumption to be equal to annual net evaporation. The annual evaporation assigned to the original permit and carried forward onto this change application is 3.27 AF/acre. For the ponds with a total surface area of 1.01 acres, this equates to 3.27 AF per year of evaporation. The depth factor assigned to the original permit and carried forward on this application is 0.4. The original permit authorized two fills of each pond per year, plus annual evaporation. The details for each pond's capacity and evaporation is included in Table 2 below. Two fills of each pond, plus annual evaporation, leads to a total diverted volume of 7.89 AF per year for the recreation purpose.

Table 2: Historic Diverted Volume for Recreation Ponds

Permitted Values							
Ponds	Permitted Surface Area (ac)	Depth (ft)	Depth Factor	Permitted Capacity (AF)	Capacity with 2 fills (AF)	Annual Evaporation (AF)	Total Diverted Volume (AF)
Pond 1	0.17	5	0.4	0.34	0.68		
Pond 2	0.12	5	0.4	0.24	0.48		
Pond 3	0.72	6	0.4	1.73	3.46		
Total	1.01			2.31	4.62	3.27	7.89

14. Annual consumption for the 3 irrigated acres of lawn is estimated with the Natural Resources Conservation Service's (NRCS) Irrigation Water Requirements program (IWR) to be 3.7 AF based on net irrigation requirement for pasture grass of 14.77 inches (1.23 feet) obtained from the Phillipsburg, Montana weather station per ARM 36.12.1902(16) and the methods outlined in the Department Technical Memorandum: DNRC Consumptive Use Methodology – Turf Grass, dated March 23, 2010. According to the Applicant, the period of diversion for lawn irrigation is generally for 120 days between early June and late September, but occurs as early as April 15th and as late as October 15th. The verified volume of water diverted for lawn irrigation was based on the pumping rate of the well (155 GPM), hours of irrigation per day (2 hours/day) and number of days irrigation occurred (120 days), which equates to 6.8 AF/year.

15. The Department finds the following historical use:

Table 3: 76E 112880-00 Historic Use

WR Number	Purpose	Flow Rate	Historic Consumptive Volume	Historic Diverted Volume	Period of Use	Point of diversion	Place of use	Priority date
76E 112880-00	Irrigation (3 acres)	155 GPM	Irrigation 3.7 AF	Irrigation 6.8 AF	April 15 to Oct 15	SEWNSE Sec 19, T6N, R15W Granite County	Irrigation: W2SWNE and NWSE of Sec 19, T6N, R15W Granite County	12/1/2000
	Multiple Domestic		Multiple Domestic 0.5 AF	Multiple Domestic 5 AF	Jan 1 to Dec 31		Multiple Domestic: SWNE and NWSE of Sec 19, T6N, R15W Granite County	
	Recreation (3 ponds)		Recreation 3.27 AF	Recreation 7.89 AF	Jan 1 to Dec 31		Recreation: SEWNSE and NESWSE of Sec 19, T6N, R15W Granite County	
			Total: 7.5 AF	Total: 19.69 AF				

FINDINGS OF FACT – Adverse Effect

16. The Applicant proposes to change their point of diversion from one existing well that will be abandoned (Westside Well - GWIC ID 179080) to another existing well (PWS Well – GWIC ID 247350) authorized under Permit 76E 30043968. The Applicant proposes to reduce their flow rate from 155 GPM to 110 GPM, to align with the flow rate on the well authorized under Permit

76E 30043968. No changes to timing, volume, or purpose of water use are proposed. As a result of this change application, the volume of water use will not change from what was originally authorized for Permit 76E 112880-00. There will be no increase in diverted or consumed volumes over historic levels.

17. Modeled drawdown in the existing well completed in the source aquifer was compared to modeled drawdown of the proposed well to determine if there are any additional water rights impacted. The drawdown in the existing well was evaluated using the Theis (1935) solution with the following inputs: Transmissivity (T) = 56,397 ft²/day, Specific yield (Sy) = 0.1, and an assumed monthly pumping schedule. Drawdown is largest at the end of July of the fifth year of pumping and that drawdown does not exceed 1 foot. After five years of an assumed monthly pumping schedule, drawdown in excess of 1 foot occurs in zero surrounding wells.

18. The proposed well (PWS Well) is approximately 800 feet from Rock Creek. The existing well that will be abandoned (Westside Well) is approximately 775 feet from Rock Creek. A hydraulic connection of the shallow groundwater and surface water bodies was evaluated with wells less than 50 feet deep, within 500 feet of Rock Creek, and with static water levels of 10 feet below ground surface (bgs). There was no evidence of a hydraulic connection along the adjacent reach of Rock Creek; however, the wells and place of use are within the Rock Creek alluvium and based on proximity, expected drawdown will likely propagate through the source aquifer to Rock Creek.

19. A comparison between the net depletion of the historic use versus the proposed use was done by evaluating the depletion from the proposed well (PWS Well) and the historic depletion from the historic well (Westside Well) that will be abandoned. Depletion by pumping in the source aquifer primarily occurs through propagation of drawdown through the source aquifer to Rock Creek.

20. The total historic consumption of 7.5 AF is distributed throughout the year based on the following breakdown: the domestic use portion (0.5 AF) is distributed throughout the whole year, evaporation from the recreation ponds (3.27 AF) is distributed based on the results from the Penman/Linacre procedure, and 3.7 AF of consumption from the irrigation use is apportioned

throughout the growing season based on IWR requirements for lawn and garden irrigation. Due to the proximity to the surface water source from the abandoned and proposed wells, Table 4 (Columns C and D) shows no change in net depletions to Rock Creek.

Table 4: Rock Creek timing of net depletions from the existing well and the proposed well.

	A	B	C	D
Month	Rock Creek Historic Depletion (AF)	Rock Creek Proposed Depletion (AF)	Difference in Depletion to Rock Creek (AF)	Difference in Depletion to Rock Creek (GPM)
January	0.2	0.2	0.0	0.0
February	0.2	0.2	0.0	0.0
March	0.2	0.2	0.0	0.0
April	0.2	0.2	0.0	0.0
May	0.4	0.4	0.0	0.0
June	1.1	1.1	0.0	0.0
July	1.6	1.6	0.0	0.0
August	1.5	1.5	0.0	0.0
September	1.0	1.0	0.0	0.0
October	0.5	0.5	0.0	0.0
November	0.3	0.3	0.0	0.0
December	0.2	0.2	0.0	0.0
Total	7.5	7.5	0.0	

21. The Department finds no adverse effect from the proposed change in point of diversion on Permit 76E 112880-00.

BENEFICIAL USE

FINDINGS OF FACT

22. The Applicant proposes to continue their permitted usage of groundwater for multiple domestic use (5 AF), recreation use (7.89 AF), and irrigation of lawn (6.8 AF), at a flow rate of 110 GPM. These purposes are recognized beneficial uses in the state of Montana and align with Department volume standards for domestic use, recreation pond usage, and turf grass irrigation. The Department finds the Applicant's proposal to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

23. The Applicant proposes to change their point of diversion from one existing well (Westside Well - GWIC ID 179080) to another existing well (PWS Well – GWIC ID 247350) authorized under Permit 76E 30043968. The Westside Well will be abandoned after issuance of this change authorization. The proposed well (PWS Well) is 570 feet to the north of the well that will be abandoned, has a depth of 104 feet, and a static water level of 44 feet below ground surface (bgs). The Applicant proposes to reduce their flow rate from 155 GPM to 110 GPM, to align with the flow rate on the well permitted under 76E 30043968. A new well pump will not be installed; therefore, the maximum capacity of the diversion will be limited to the 110 GPM flow rate as authorized by Permit 76E 30043968. The proposed well (PWS Well) is screened in the same source aquifer as the abandoned well (Westside Well). A meter is already installed on the PWS Well, to comply with a monthly flow rate and volume measurement condition on Permit 76E 30043968. The water system for Permit 76E 112880-00 will be joined to the water system for Permit 76E 30043968. This proposed change will increase the total annual diverted volume from the proposed well (PWS Well) to 24.19 AF (4.5 AF with Permit 76E 30043968 + 19.69 AF with Permit 76E 112880-00), because total usage will now involve two permits but will not increase the total flow rate, which will remain 110 GPM.

24. The PWS Well was drilled September 17, 2008, by Jerome's Drilling Co., a licensed well driller. This well has already been approved by MTDEQ as a Public Water Supply Well.

25. The Applicant is held to the following water measurement condition:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE

SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

26. The Department finds this diversion adequate for the proposed beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

27. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

28. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605

(1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

29. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

30. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

31. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

32. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

33. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

34. Based upon the Applicant's evidence of historical use, the Applicant has proven by a preponderance of the evidence the historical use of Provisional Permit No. 76E 112880-00 of 19.69 AF of diverted volume and 155 GPM flow rate, with a consumptive use of 7.5 AF. (FOF Nos. 9 - 15)

35. Based upon the Applicant's comparative analysis of historical water use to water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 16 - 21)

BENEFICIAL USE

36. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana" McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the

same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

37. The Applicant proposes to use water for the purposes of multiple domestic, recreation, and irrigation which are recognized beneficial uses. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that multiple domestic, recreation, and irrigation purposes are beneficial uses and that 19.69 acre-feet of diverted volume and 110 GPM flow rate of water requested is the amount needed to sustain the beneficial uses § 85-2-402(2)(c), MCA (FOF Nos. 22)

ADEQUATE MEANS OF DIVERSION

38. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of

Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

39. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 23-26)

POSSESSORY INTEREST

40. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M. 36.12.1802

41. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 27)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76E 30150235 should be GRANTED subject to the following.

The Applicant is authorized to change the point of diversion on Permit 76E 112880-00 to an existing well located in the NENWSE of Section 19, T6N, R15W, Granite County and previously authorized and verified under Permit 76E 30043968. The original point of diversion, consisting of a well located in the SENWSE of Section 19, T6N, R15W, Granite County will be abandoned upon issuance of this change authorization. The flow rate on Permit 76E 112880-00 will be reduced to 110 GPM, to align with the flow rate of the well authorized under Permit 76E 30043968. All other components of Permit 76E 112880-00 will remain the same as previously

authorized. In aggregate, the maximum flow rate and volume of water that will be diverted from the proposed well with Permits 76E 112880-00 and 76E 30043968 will not exceed 110 GPM and 24.19 AF per year.

The Applicant is held to the following condition:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this

Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this 30th day of August 2022.

/Original signed by Jim Nave/
Jim Nave, Regional Manager
Missoula Regional Office
Water Resources Division
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 30th day of August 2022, by first class United States mail.

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